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No. 82-346

In the Supreme Court of the United States

October Term, 1981

DR. JOSEPH T. SKEHAN,
Petitioner

v.

BOARD OF TRUSTEES OF BLOOMSBURG STATE COLLEGE, DR. ROBERT NOSSEN, DR. CHARLES CARLSON, JOHN PITTENGER, Superintendent of Education, Commonwealth of Pennsylvania, and BLOOMSBURG STATE COLLEGE,
Respondents

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit at Nos. 81-1094 and 81-1299

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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COUNTER-STATEMENT OF THE CASE

This case arises from the 1970 nonrenewal and subsequent termination of petitioner Skehan from his position as a non-tenured faculty member at Bloomsburg State College.

Skehan commenced this §1983 action in October, 1972, alleging violations of his First and Fourteenth Amendment rights in connection with his termination. His request for preliminary injunctive relief was denied by the district court on January 31, 1973. *Skehan v. Board of Trustees of Bloomsburg State College*, 353 F. Supp. 542 (M.D. Pa. 1973).

At the request of the parties, the district court subsequently rendered judgment on the merits based on the record developed at the preliminary injunction hearing. *Skehan v. Board of Trustees of Bloomsburg State College*, 358 F. Supp. 430, 431 (M.D. Pa. 1973). The district court concluded that Skehan's termination did not violate the First Amendment. *Skehan, supra*, at 434. The court went on to hold, however, that Skehan was entitled to a pretermination hearing under the Fourteenth Amendment. Finally, the lower court awarded Skehan nominal damages of one dollar based on its finding that "the circumstances surrounding this particular case indicate that had Plaintiff been afforded a hearing prior to his discharge, in all probability the outcome would have been the same." *Id.* at 436.

On Skehan's appeal, the Third Circuit Court of Appeals affirmed the district court on the First Amendment issue and on the due process issue with regard to the termi-

nation. The court then went on to raise two issues which had not been addressed by the district court and one issue which had not been previously raised by the parties.

The issues not addressed by the district court were, whether the decision not to renew Skehan's contract violated the First Amendment and whether, in violation of due process, Skehan was denied nonrenewal procedures guaranteed to him under Article 5 (e) of the Statement of Policy for Continuous Employment and Academic Freedom at Bloomsburg State College (hereinafter "Statement of Policy"). *Skehan v. Board of Trustees of Bloomsburg State College*, 501 F.2d 31, 38-40 (3d Cir. 1974). The Third Circuit ordered both issues remanded for further proceedings. *Id.*

The issue raised by the court *sua sponte* was whether Bloomsburg State College was an arm of the Commonwealth for the purposes of the Eleventh Amendment. *Id.* at 42-43. This issue was also ordered remanded for further proceedings along with a question on the propriety of granting attorney's fees.

Skehan petitioned this Court for a writ of certiorari on the question of official immunity and attorney's fees. After granting the petition, this Court remanded the issues for further consideration in light of *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975), and *Wood v. Strickland*, 420 U.S. 308 (1975). *Skehan v. Board of Trustees of Bloomsburg State College*, 421 U.S. 983 (1975).

On remand, the Third Circuit reconsidered the case *en banc*. In addition to discussing the issues remanded by this Court, the Third Circuit again addressed the status of Bloomsburg State College for the purposes of the Eleventh Amendment. The court held that the College was indeed

an agent of the Commonwealth that shared its immunity to suits for damages in federal court. *Skehan v. Board of Trustees of Bloomsburg State College*, 538 F.2d 53, 62 (3d Cir. 1976) (217a). The Third Circuit based its conclusion on an intervening state case, *Brungard v. Hartman*, 12 Pa. Commonwealth Ct. 477, 315 A.2d 913 (1974), which held that state colleges, such as Bloomsburg, are agents of the Commonwealth rendering them immune from suit in state courts under the common-law doctrine of sovereign immunity. *Skehan, supra*, 538 F.2d at 62 (217a).

With regard to nonrenewal, the court remanded the First Amendment and due process issues. It also ordered the district court, to make findings of fact on the official immunity of the individual defendants, to determine appropriate remedies and to consider an award of attorney's fees against defendants. *Id.* (218a-219a).

On remand, the district court resolved the First Amendment question in favor of defendants on a motion for summary judgment. *Skehan v. Board of Trustees of Bloomsburg State College*, C.A. No. 72-644 (M.D. Pa., March 24, 1977) (173a-87a). Following a hearing, the court decided that Skehan had a protected interest in specified nonrenewal procedures and that the failure to afford Skehan those procedures violated the due process clause. *Skehan v. Board of Trustees of Bloomsburg State College*, 431 F. Supp. 1379, 1391 (M.D. Pa. 1977) (145a-70a). The court also found that defendant Nossen, the former President of Bloomsburg State College, had acted in good faith with regard to both the nonrenewal and the termination. *Id.* at 1388, 1391 (166a, 170a).

The district court then held hearings on an appropriate remedy. Based on those hearings, on July 20, 1977, the court ordered that Skehan be reinstated as a faculty mem-

ber at the Co[illegible] in suspended status, without teaching duties, pending administrative hearings to determine whether the nonrenewal and termination were proper. The district court also denied attorneys' fees based in part on the Eleventh Amendment and in part on equitable considerations. *Skehan v. Board of Trustees of Bloomsburg State College*, 436 F. Supp. 657 (M.D. Pa. 1977) (141a-45a).

In accordance with the district court's order, a nonrenewal hearing was held before the Committee on Professional Affairs, as specified by Article 5(e) of the Statement of Policy. The Committee found that Skehan was not renewed for reasons "violative of his academic freedom" and recommended that he be reinstated. *See, Skehan v. Board of Trustees of Bloomsburg State College*, 669 F.2d 142, 145 (3 Cir. 1982) (5a). Based on the Committee's recommendation, the College decided not to pursue the additional nonrenewal proceedings specified by the district court and, subsequently, withdrew the letter of nonrenewal.

At the same time, the College elected to proceed with the termination hearing which was also required by the district court's order. *See, id.* Following hearings, the majority of the Committee on Professional Affairs recommended that Skehan be terminated. The College adopted the recommendation and terminated Skehan on June 2, 1978. *See, id.* (5a).

While the nonrenewal and termination proceedings were underway, Skehan appealed the district court's decision. Among other issues, Skehan raised the failure of the district court to award damages against the college.

The Third Circuit rejected Skehan's argument that §1983 must be construed as a congressional waiver of the

Commonwealth's Eleventh Amendment immunity. *Skehan v. Board of Trustees of Bloomsburg State College*, 590 F.2d 470, 488-91 (3d Cir. 1978) (77a-83a). In addition, the court found it unnecessary to address Skehan's second argument that the Commonwealth's Eleventh Amendment immunity had been waived by *Mayle v. Pennsylvania Department of Highways*, 479 Pa. 384, 388 A.2d 709 (1978), a Pennsylvania Supreme Court decision that abrogated the judicially created state-law doctrine of sovereign immunity. 590 F.2d at 487 (76a). Instead, the court found that the Pennsylvania legislature had overruled *Mayle* by passing Act 1978-152, which reaffirmed and preserved the sovereign immunity of the Commonwealth and its agencies. 590 F.2d at 487 (76a).

The Third Circuit affirmed the district court's other judgments in almost all respects, remanding only for consideration of an award of attorney's fees to Skehan against defendants in their official capacities, pursuant to the Civil Rights Attorney's Fees Awards Act of 1976.

Skehan sought a writ of certiorari to this Court which was denied on October 1, 1979.

On remand to the district court, in addition to petitioning for attorney's fees, Skehan moved for an award of special damages against Bloomsburg State College.[1] Skehan based his motion on a state court case that struck down the retroactive application of Act 1978-152. He then argued again that the *Mayle* case waived the Commonwealth's Eleventh Amendment immunity.

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[1] Skehan also filed a motion challenging the manner in which the nonrenewal and termination hearings were carried out under the district court's order. That moton was denied, and the denial was affirmed on appeal. Skehan has not raised the propriety of that decision in his petition for certiorari.

> The district court denied his motion concluding that: the fact that Pennsylvania may not be able to assert its sovereign immunity in state courts does not remove the bar of the Eleventh Amendment to the exercise of this Court's subject-matter jurisdiction over Skehan's claims against Bloomsburg State College.

Skehan v. Board of Trustees of Bloomsburg State College, No. 72-644 (M.D. Pa., filed November 24, 1980) (38a).

On appeal, the Third Circuit affirmed the district court's decision that the *Mayle* case did not constitute a waiver of the Commonwealth's Eleventh Amendment immunity. *Skehan v. Board of Trustees of Bloomsburg State College*, 669 F.2d 142, 145-49 (3d Cir. 1982) (5a-13a). Skehan did not raise and the Court of Appeals did not decide whether the Eleventh Amendment was inapplicable because Skehan sought to vindicate his Fourteenth Amendment rights.

On June 10, 1982, Skehan sought an extension of time within which to file his petition for certiorari, which was granted by Justice Brennan on June 15, 1982. He then filed his petition with this Court on August 23, 1982.

SUMMARY OF ARGUMENT

The petition for certirari should be denied for two reasons. First, this Court has already decided that 42 U.S.C. §1983 does not abrogate the Eleventh Amendment, regardless of what constitutional rights are sought to be vindicated. *Alabama v. Pugh*, 438 U.S. 781 (1978); *see also, Quern v. Jordan*, 440 U.S. 332 (1979).

Second, petitioner did not raise this question before the Court of Appeals; nor, was it briefed and decided below. Petitioner also fails to point to any exceptional circumstances that would require this Court to ignore its normal policy and to agree to hear the issue.

For both of these reasons, the petition for certiorari should be denied.

ARGUMENT

I. The Question Presented by Petitioner Has Been Settled by This Court

Petitioner requests this Court to grant certiorari to decide whether he is entitled, as plaintiff in a §1983 action, to recover damages against an agency of the Commonwealth of Pennsylvania, because he seeks to vindicate his Fourteenth Amendment rights.[2] Because this Court has already settled the issue, the petition should be denied.

In *Alabama v. Pugh,* 438 U.S. 781 (1978), a *per curiam* decision, this Court held that the Eleventh Amendment barred an action against the State of Alabama and the Alabama Board of Corrections even though violations of the Eighth and Fourteenth Amendments were alleged. The opinion stated, "There can be no doubt . . . that suit against the State and its Board of Corrections is barred by the Eleventh Amendment, unless Alabama consented to the filing of such a suit." *Id.* at 782.

Petitioner erroneously argues that the opinion in *Hutto v. Finney,* 437 U.S. 678 (1978), left the question he raises unanswered. In *Quern v. Jordan,* 440 U.S. 332 (1979), this Court closed the door on that argument:

[2] On October 12, 1982, respondents received petitioner's "Motion to Amend Petition for a Writ of Certiorari," in which he seeks to raise two additional issues for review by this Court. Because this motion was filed out of time, respondents will not address those issues in this brief.

> While the separate opinions in *Hutto v. Finney*, supra, debated the continuing soundness of *Edelman* [*v. Jordan*, 415 U.S. 651 (1974)] after our decision in *Monell* [*v. Department of Social Services*, 436 U.S. 658 (1978)], any doubt on that score was largely dispelled by *Alabama v. Pugh, supra*, decided just 10 days after *Hutto*. In *Pugh* the Court held, over three dissents, that the State of Alabama could not be joined as a defendant without violating the Eleventh Amendment, even though the complaint was based on 42 U.S.C. §1983 and the claim was a violation of the Eighth and Fourteenth Amendments similar to that made in *Hutto*.

Id. at 339-40 (bracketed material supplied).

It would be a waste of judicial time for this Court to reconsider an issue that has been decided so recently. Moreover, petitioner has not pointed to any special circumstances that suggest reconsideration is in order.

Accordingly, the petition for certiorari should be denied.

II. Even if the Question Raised by Petitioner Is Unsettled, the Issue Was Not Properly Raised Below and Should Not Be Considered by This Court

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In the Court of Appeals, petitioner failed to raise the effect of the Fourteenth Amendment on the College's Eleventh Amendment immunity. Instead, he argued only that the Commonwealth had waived its immunity when the Pennsylvania Supreme Court abrogated the state-law doctrine of sovereign immunity in *Mayle v. Pennsylvania Department of Highways, supra.*

It is the normal policy of this Court not to consider questions that have not been raised in the Court of Appeals. *Delta Airlines v. August*, 450 U.S. 346 (1981). Indeed, "[i]t is only in exceptional cases coming here from the federal courts that questions not pressed or passed upon below are reviewed." *Dunigan v. United States*, 274 U.S. 195, 200 (1927).

Petitioner does not reveal, nor does this case present, the sort of exceptional circumstances under which this Court should agree to hear an issue that was not properly presented below. There is no conflict among the circuits that requires immediate resolution. In fact, the Courts of Appeals have uniformly recognized that §1983 does not abrogate the Eleventh Amendment regardless of the constitutional right that is asserted. *See, Helfrich v. Commonwealth of Pennsylvania*, 660 F.2d 88 (3d Cir. 1981); *Sessions v. Rusk State Hospital*, 648 F.2d 1066 (5th Cir. 1981); *Familias Unidas v. Briscoe*, 619 F.2d 391 (5th Cir. 1980); *Ginter v. State Bar of Nevada*, 625 F.2d 829 (9th Cir. 1980); *Garret v. State of Illinois*, 612 F.2d 1038 (7th Cir. 1979), *cert. denied*, 449 U.S. 821 (1980). Furthermore, in light of the potentially broad impact of a decision on the issue raised, this Court should have the benefit of a full adjudication below.

Therefore, this Court should refuse to grant certiorari on petitioner's question which was neither raised, briefed, nor decided in the Court of Appeals.

CONCLUSION

For the preceding reasons, it is respectfully submitted that the petitioner has presented no issues worthy of discretionary review by this Court; and, therefore, his Petition should be denied.

Respectfully submitted,

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